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Non-compete Laws: Utah

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A Q&A guide to non-compete agreements between employers and employees for private employers in Utah. This Q&A addresses enforcement and drafting considerations for restrictive covenants such as post-employment covenants not to compete and non-solicitation of customers and employees. Federal, local or municipal law may impose additional or different requirements. Answer to questions can be compared across a number of jurisdictions (see *Non-compete Laws: State Q&A Tool*).

OVERVIEW OF STATE NON-COMPETE LAW

- 1. If non-competes in your jurisdiction are governed by statute(s) or regulation(s), identify the state statute(s) or regulation(s) governing:
- Non-competes in employment generally.
- Non-competes in employment in specific industries or professions.

GENERAL STATUTE AND REGULATION

Utah does not have any statutes or regulations governing non-competes generally.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

Attorneys: Utah R. of Prof'l Conduct 5.6

Rule 5.6 of the Utah Rules of Professional Conduct governs non-competes in the legal industry.

2. For each statute or regulation identified in *Question 1*, identify the essential elements for non-compete enforcement and any absolute barriers to enforcement identified in the statute or regulation.

GENERAL STATUTE AND REGULATION

Utah does not have any statutes or regulations governing non-competes generally.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

Attorneys: Utah R. of Prof'l Conduct 5.6

A lawyer cannot offer or make:

- A partnership or employment agreement that restricts lawyers from practicing law after ending the relationship, except for an agreement about retirement benefits.
- A settlement agreement that restricts lawyers from practicing law as a part of the settlement of a client controversy.

(Utah R. Prof'l Conduct 5.6.)

ENFORCEMENT CONSIDERATIONS

3. If courts in your jurisdiction disfavor or generally decline to enforce non-competes, please identify and briefly describe the key cases creating relevant precedent in your jurisdiction.

To be enforceable, Utah courts require non-competes to be:

- Supported by consideration.
- Negotiated in good faith.
- Necessary to protect the goodwill of the business.
- Reasonable in duration and geographic area.

(Allen v. Rose Park Pharmacy, 237 P.2d 823 (Utah 1951) and Kasco Serv. Corp. v. Benson, 831 P.2d 86 (Utah 1992)).



Utah employers must also limit the use of non-competes to employment relationships with employees who perform services that are:

- Special.
- Unique.
- Extraordinary.

(Sys. Concepts, Inc. v. Dixon, 669 P.2d 421, 426 (Utah 1983).)

Utah courts will only enforce non-compete agreements if they are narrowly tailored "to protect the legitimate interests of the employer" (*Robbins v. Finlay, 645 P.2d 623 (Utah 1982)*). Protectable interests include:

- Trade secrets.
- The goodwill of a business.
- The investment in education or training of an employee.

(Sys. Concepts, 669 P.2d at 426; Robbins, 645 P.2d at 627-28; Rose Park Pharmacy, 237 P.2d at 823.)

4. Which party bears the burden of proof in enforcement of non-competes in your jurisdiction?

Generally the party seeking to enforce a non-compete must show:

- The existence of a valid contract.
- That the non-compete is reasonable and enforceable.

(Bair v. Axiom Design, 20 P.3d 388, 392 (Utah 2001) and Sys. Concepts, 669 P.2d at 425-26.)

For non-competes connected with the sale of a business, the defendant bears the burden of proof. These non-competes are not strictly construed against the party seeking to enforce them (*Elec. Distribs., Inc. v. SFR, Inc., 166 F.3d 1074, 1084 (10th Cir. 1999)*).

5. Are non-competes enforceable in your jurisdiction if the employer, rather than the employee, terminates the employment relationship?

Non-competes are enforceable in Utah if the employer terminates the employment relationship (Rose Park Pharmacy, 237 P.2d at 824 and 828).

BLUE PENCILING NON-COMPETES

6. Do courts in your jurisdiction interpreting non-competes have the authority to modify (or "blue pencil") the terms of the restrictions and enforce them as modified?

Utah courts have not specifically adopted the blue-pencil approach. However, in System Concepts, the Utah Supreme Court interpreted a non-compete with no geographic limitation to include a nationwide geographic restriction because, at the time, the cable industry was inherently limited by a small number of potential customers located throughout the US (669 P.2d at 427).

CHOICE OF LAW PROVISIONS

7. Will choice of law provisions contained in non-competes be honored by courts interpreting non-competes in your jurisdiction?

Utah state courts have not addressed choice of law provisions in non-competes. However, the US Court of Appeals for the Tenth Circuit, in *Electrical Distributors*, found that when analyzing a choice of law provision in a non-compete, it must consider whether enforcement of the non-compete under another state's law would violate a fundamental policy of Utah (166 F.3d at 1084).

REASONABLENESS OF RESTRICTIONS

8. What constitutes sufficient consideration in your jurisdiction to support a non-compete agreement?

A non-compete signed when employment begins is supported by sufficient consideration (*Rose Park Pharmacy, 237 P.2d at 828*).

For at-will employment relationships, the Utah Supreme Court found that continued employment or the promise of continued employment may be sufficient consideration to support a covenant not to compete (Sys. Concepts, 669 P.2d at 426-427, 429).

9. What constitutes a reasonable duration of a non-compete restriction in your jurisdiction?

In Utah, reasonableness of duration for non-competes depends on the facts of each case. Utah courts will likely consider the nature of the employers interest that the covenant is designed to protect. For example, in *Rose Park Pharmacy*, the Utah Supreme Court suggested that the non-compete designed to protect the employer's goodwill should last no longer than the time reasonably necessary for the employer "to consolidate its goodwill in order to withstand any competition" by the former employee (*237 P.2d at 828*).

Courts in Utah have found the following time periods reasonable:

- A two-year restriction was "at least probably" reasonable for a non-compete protecting employer goodwill developed by the former employee and trade secret information (Sys. Concepts, 669 P.2d at 426).
- A five-year restriction was held to be reasonable to protect a company's goodwill, though the employer "might have made the reasonableness of the restriction more certain by prescribing a shorter period of time" (Rose Park Pharmacy, 237 P.2d at 828).

10. What constitutes a reasonable geographic non-compete restriction in your jurisdiction?

Utah courts determine the reasonableness of non-compete restrictions based on the facts of each case (Sys. Concepts, 669 P.2d at 427). However, non-compete covenants must be "carefully drawn to protect only the legitimate interests of the employer" (Robbins v.

Finlay, 645 P.2d 623, 627 (Utah 1982)). In System Concepts, the Utah Supreme Court noted that the more local the interest being protected by the non-compete, the more narrowly drawn the geographic limitation must be (669 P.2d at 427).

Utah courts have found the following geographic restrictions reasonable:

- No specific geographic restriction was reasonable where the employer cable company had customers nationwide and the restrictions on the former employee's activity were more useful to protect the employer's interest than a geographic limitation (*Sys. Concepts*, 669 P.2d at 427).
- A two-mile restriction was reasonable to protect an employer from former employee's competition where the business was a small pharmacy and the time restriction was limited to five years. The Utah Supreme Court looked at:
 - the customers' normal shopping habits;
 - the number of other drug stores within the two-mile radius; and
 - the number of drug stores in the greater metropolitan area.

(Rose Park Pharmacy, 237 P.2d at 828.)

In *Tahitian Noni International v. Dean*, the US District Court for the District of Utah found the geographical scope of a non-compete between a multilevel marketing company and its employee unreasonable where the provision barred the employee from working for any other network marketing companies in the world for a period of three years. The court looked at the geographic and subject scope in connection with the time limitations and found that the three year restriction was particularly unreasonable because of the nature of the marketing industry in which individuals derive income from other salespeople they recruit. Over three years, the former employee would lose all contacts because he was restricted from the entire industry globally and his former salespeople would be forced to sign contracts with other individuals. (*No. 2:09-CV-51, 2009 WL 197525, at * 3, *4 (D. Utah Jan. 26, 2009).*)

11. Does your jurisdiction regard as reasonable non-competes that do not include geographic restrictions, but instead include other types of restrictions (such as customer lists)?

Utah courts determine the reasonableness of non-compete restrictions based on the facts of each case. In *System Concepts*, the court found a non-compete with no geographic restriction reasonable where other facts created boundaries that made the restriction reasonable. The court found that:

- The business had "inherent limitations" due to its small customer base.
- The non-compete's restrictions on the former employee's activity were more appropriate and useful to protect the employer's interest than a geographic limitation.

(669 P.2d at 427.)

12. Does your jurisdiction regard as reasonable geographic restrictions (or substitutions for geographic restrictions) that are not fixed, but instead are contingent on other factors?

Utah courts have found geographic restrictions that are not fixed reasonable if other reasonable limitations apply (see *Question 11*).

13. If there is any other important legal precedent in the area of non-compete enforcement in your jurisdiction not otherwise addressed in this survey, please identify and briefly describe the relevant cases.

There is no other important legal precedent in the area of non-compete enforcement in Utah.

REMEDIES

14. What remedies are available to employers enforcing non-competes?

Utah employers enforcing non-competes may seek:

- An injunction.
- Lost profits, measured as the employer's lost profits.

(TruGreen Co., L.L.C. v. Mower Bros., Inc., 199 P.3d 929, 932 (Utah 2008).)

An employer may also seek:

- Attorneys' fees, only if provided for in the contract (Smith v. Grand Canyon Expeditions Co., 84 P.3d 1154, 1162 (Utah 2003)).
- Liquidated damages under a contract, if the compensation is reasonably related to actual damages (*Robbins*, 645 P.2d at 625-626).

15. What must an employer show when seeking a preliminary injunction for purposes of enforcing a non-compete?

When enforcing a non-compete using a preliminary injunction, the employer must show that:

- The employer will likely suffer irreparable harm unless the injunction is issued.
- The threatened injury to the employer outweighs whatever damage the proposed injunction may cause the former employee.
- The injunction, if issued, would not be adverse to the public interest.
- There is a substantial likelihood that the employer will prevail on the merits of the underlying claim or the case presents serious issues on the merits that should be the subject of further litigation.

(Utah R. Civ. P. 65A(e).)

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OTHER ISSUES

16. Apart from non-competes, what other agreements are used in your jurisdiction to protect confidential or trade secret information?

In Utah, non-solicitation agreements and confidentiality agreements are common. For examples, see:

- J&K Computer Systems, Inc. v. Parrish, where the Utah Supreme Court upheld an employer's non-disclosure and non-compete agreements protecting confidential computer programs (642 P.2d 732, 734-736 (Utah 1982)).
- In *TruGreen*, where the Utah Supreme Court held that lost profits is the correct measure of damages for breach of non-compete, non-disclosure and employee non-solicitation provisions (199 P.3d 929 (Utah 2008)).

17. Is the doctrine of inevitable disclosure recognized in your jurisdiction?

While Utah appellate courts have not addressed the doctrine of inevitable disclosure, at least one trial court has recognized and adopted the doctrine (*Novell, Inc. v. Timpanogos Research Grp., Inc., 46 U.S.P.Q.2d 1197, 1215-1217 (D. Utah 1998)*).

For the links to the documents referenced in this note, please visit our online version at http://us.practicallaw.com/9-520-5822

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