Danya Shakfeh
Attorney at Law
Oak Brook, Illinois
(630) 517-5529
dshakfeh@shakfehlaw.com
www.ShakfehLaw.com

ILLINOIS NON-COMPETE GUIDE

(As of June 16, 2018)

Whether you are an employer or employee, knowing what courts look for when enforcing restrictive covenants and non-compete clauses will avoid a lot of confusion and stress. As an employer, if you truly want to enforce your non-compete with respect to an employee, you must draft it accordingly. As an employee, you will have an edge in your negotiations and post-employment decision-making if you understand the requirements for enforcement. Further, unlike some other jurisdictions, Illinois courts rarely, if ever, "blue pencil" (fix) overly broad non-compete agreements. See AssuredPartners, Inc. v. Schmitt, 2015 IL App (1st) 141863, ¶ 52. Accordingly, employers should not rely on the possibility that should a non-compete be litigated, that the court would assist in the covenant's enforceability. To assist in drafting or negotiating your non-competes, below is a chart with questions to ask yourself when drafting or reviewing a non-compete clause and the supporting sources.

Danya Shakfeh
Attorney at Law
Oak Brook, Illinois
(630) 517-5529
dshakfeh@shakfehlaw.com
www.ShakfehLaw.com

Check?	Comments	Source(s)
Is your Employee a "low wage" employee?	A "low wage employee" is an employee making $13.00 or less per hour. The law now prohibits enforceability of covenants not-to-competes for low-wage employees if the low wage employee is employed in another low-wage position (eff. January 1, 2017).	Illinois Freedom to Work Act
UNSETTLED LAW ALERT		
Does your covenant include "adequate consideration"?	Restrictive covenants differ from other contracts in that they require adequate and separate consideration. At-will employment alone is not sufficient consideration.	• Fifield v. Premier Dealer Servs., *Inc*., 2013 IL App. (1st) 120327 (2013)
	State courts have held that two years after entering an employment contract is adequate consideration. Courts scrutinize restrictive covenants heavily and against the employer. This bright-line standard was applied in Fifield.	• In Fifield v. Premier Dealer Servs., *Inc*., 2013 IL App. (1st) 120327 (2013) • Prairie Rheumatology Assoc., S.C. *v*. Francis, 2014 IL App. (3d) 140338
	Federal courts, however, overwhelmingly reject the bright-line two-year rule and opt for a fact-specific totality-of-the-	• Apex Physical Therapy v. Ball et al., Case No. 3:17-cv-119 (S.D. Ill. 2017)

Danya Shakfeh
Attorney at Law
Oak Brook, Illinois
(630) 517-5529
dshakfeh@shakfehlaw.com
www.ShakfehLaw.com

Check?	Comments	Source(s)
	circumstances rule in order to determine the adequacy of consideration. The test still includes that an employee must work for an employer for a "substantial period" of time. In Stericyle, a thirteen-month employment was sufficient (among other things) consideration. For fact-specific analyses, courts will consider the length of their employment, circumstances of termination, terms of hiring, and which party terminated the employment.	• Stericycle, Inc. v. Simota, Case No. 16 C 4782 (N.D. 2017)
	The difference of a court applying the two-year rule versus a fact-specific-totality of the circumstances rule will likely hinge on whether the case is in state court or federal court. The Illinois Supreme Court has yet to resolve this question.	
Is the restrictive covenant reasonable?	A restrictive covenant is reasonable if: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee promisor, and (3) is not injurious to the public.	Reliable Fire Equip. Co. v. Arredondo, 2011 IL 111871, ¶17.
Is the restriction no greater than	Court will use "totality of the circumstances" test. Reliable	Reliable Fire Equip. Co.

Danya Shakfeh
Attorney at Law
Oak Brook, Illinois
(630) 517-5529
dshakfeh@shakfehlaw.com
www.ShakfehLaw.com

Check?	Comments	Source(s)
what is required for the protection of a legitimate business interest of the employer?	expressly rejects the notion that a legitimate interest can be created solely through contract. It is an employer's burden to demonstrate a legitimate business interest. Courts will consider the following factors: (1) whether employee acquired confidential information, or (2) customer relationships, the nature of the business, and near-permanence of customers.	v. Arredondo, 2011 IL 111871, ¶34.
Are the activity restraints reasonable?	An employer can not prevent competition in and of itself and a restraint must be reasonable and tailored towards an employer's protectable interests. "As a matter of law, defendant cannot have a protectable interest in future customers who do not yet exist." Non-competition in activities similar to what employee performed while with employer are considered a more "reasonable" restraint. "Courts are hesitant to enforce prohibitions against an employee's servicing not only customers with whom they had direct contact, but also customers they never solicited or had contact with while employed by plaintiff." "A covenant not to solicit that prohibits an employee from soliciting any of the employer's clients is less likely to be upheld as a reasonable restraint on trade than a covenant not	• Eichmann v. Nat'l Hosp. & Health Care Servs., Inc., 308 Ill. App. 3d 337, 346 (1999). • McRand, Inc. v. van Beelen, 138 Ill. App. 3d 1045, 1057, 486 N.E.2d 1306, 1315 (1985) • Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc., 292 Ill. App. 3d 131, 141 (1997)

Danya Shakfeh
Attorney at Law
Oak Brook, Illinois
(630) 517-5529
dshakfeh@shakfehlaw.com
www.ShakfehLaw.com

Check?	Comments	Source(s)
	to solicit which prohibits an employee only from soliciting clients with which the employee has had contact while he or she was employed with the employer."	
Are the time restraints reasonable?	Two years is a general standard in Illinois, and, as a general rule, employers should not ask for longer. But, this is not a bright-line test. The question is: how long does it take (1) before the "competitive edge" used by the former employee becomes stale; or (2) to develop new customers? This depends on the industry. Fast-paced industries, especially in the tech industry, might have a faster stale period. Having no temporal limit greatly decreases the changes that a court will uphold a restrictive covenant.	Unisource Worldwide, Inc. v. Carrara, 244 F. Supp. 2d 977, 982-83 (C.D. Ill. 2003)
Are the geographic restraints reasonable?	Non-competition agreements that extend beyond the geographic boundaries of the former sales territory have often been held unreasonable and unenforceable. A lack of geographic restraint, on its own, will not necessarily deem a restrictive covenant invalid depending on the type of activity restraint included: (a) Covenants that restrict an employee from doing a very specific type of work that was highly related to the specific work he/she was doing while with the employer might be allowed without a geographic limitation. (b) Similarly,	Stunfence, Inc. v. Gallagher Sec. (USA), Inc., No. 01 C 9627, 2002 WL 1838128, at *6 (N.D.Ill. Aug. 12, 2002).

Danya Shakfeh
Attorney at Law
Oak Brook, Illinois
(630) 517-5529
dshakfeh@shakfehlaw.com
www.ShakfehLaw.com

Check?	Comments	Source(s)
	agreements that specify the exact customers that may not be contacted might be allowed even without a geographic restraint. (c) And, specific non-disclosure agreements may be upheld without a geographic restraint, since disclosure of trade secrets carries potential liability under the Illinois Trade Secret Act.	
Does the covenant lead to undue hardship to the employee?	Courts will examine whether the restrictive covenant effectively deprives the employee from engaging in his or her field in any capacity.	Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc., 292 Ill. App. 3d 131, 141 (1997)
Is the covenant injurious to the public?	As part of this prong, courts will look to see whether the public has access to other companies or if the particular industry and employee's new employer.	• Lawrence & Allen, Inc. v. Cambridge Human Res. Grp., Inc., 292 Ill. App. 3d 131, 141 (1997) • Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 482 (1998)