



Non-compete Laws: Kansas

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A Q&A guide to non-compete agreements between employers and employees for private employers in Kansas. 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. Answers to questions can be compared across a number of jurisdictions (see *Non-compete Laws: State Q&A Tool*).

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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

In Kansas, there is no state statute or regulation governing non-competes in employment generally.

Industry- or Profession-specific Statute or Regulation

Attorneys: Rule of Professional Conduct 5.6

Rule 5.6 of the Kansas Rules of Professional Conduct governs non-compete agreements 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

In Kansas, there is no state statute or regulation governing non-competes in employment generally.

Industry- or Profession-specific Statute or Regulation

Attorneys: Rule of Professional Conduct 5.6

A lawyer cannot offer or make either a:

- Partnership, employment or other similar agreement that restricts the rights of a lawyer to practice after termination of

the relationship, except an agreement concerning benefits on retirement.

- Settlement agreement that restricts a lawyer's right to practice law.

(*Kan. R. Prof'l Conduct R. 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.

Kansas courts generally do not interfere with an employer and employee's freedom to contract (*Weber v. Tillman*, 913 P.2d 84, 96 (*Kan.* 1996)). However, Kansas courts will only enforce a non-compete if it is:

- Reasonable under the circumstances.
- Not adverse to the public welfare.

(*Weber*, at 89.)

When determining whether a non-compete in an employment contract is reasonable and enforceable, courts consider whether it:

- Protects a legitimate business interest.
- Imposes an undue burden on the employee.
- Injures the public.
- Includes reasonable time and territory restrictions.

(*Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.3d 81, 87 (*Kan.* 2005) and *Weber*, at 90.)

In addition, restrictive covenants must be both:

- Supported by consideration (see, for example, *Puritan-Bennett Corp. v. Richter*, 657 P.2d 589, 591 (*Kan. Ct. App.* 1983) and *Evco Distrib., Inc. v. Brandau*, 626 P.2d 1192, 1196-98 (*Kan. Ct. App.* 1981)).
- Ancillary to an otherwise lawful contract (see, for example, *Weber*, at 89, *E. Distrib. Co. v. Flynn*, 567 P.2d 1371, 1376 (*Kan.* 1977) and *Tong v. McArthur*, 250 P. 262, 263 (*Kan.* 1926)).

Even if a court finds a non-compete enforceable, it will construe the non-compete strictly against the employer (*Weber*, at 89 and *Gen. Surgery, P.A. v. Suppes*, 953 P.2d 1055, 1057 (Kan. Ct. App. 1998)).

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

Generally, the plaintiff has the burden to prove that his claims are more probably true than not, and the defendant has the burden to prove that his claims are more probably true than not (*Pattern Instructions Kansas, Civil 4th 106.01*). However, the party challenging the enforceability of a non-compete, typically the employee subject to the restriction, bears the burden of proving that it is not enforceable (*Wichita Clinic, P.A. v. Louis*, 185 P.3d 946, 951 (Kan. Ct. App. 2008)).

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

There is no reported Kansas case or statute that prohibits an employer from enforcing a non-compete if the employer rather than the employee terminates the employment relationship.

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?

As courts of equity, Kansas courts may modify or blue pencil restrictive covenants (*Puritan-Bennett Corp.*, at 211-12 and *E. Distrib. Co.*, at 1378-79).

Courts of equity have broad discretion to enforce restrictive covenants to the extent reasonably necessary to carry out the protective intent of the parties (*Foltz v. Struxness*, 215 P.2d 133, 137 (Kan. 1950)).

CHOICE OF LAW PROVISIONS

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

Kansas courts typically uphold choice of law provisions in non-compete agreements and contracts containing non-compete provisions (*Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1360 (10th Cir. 1990), *O. V. Mktg. Assocs., Inc. v. Carter*, 766 F. Supp.

960, 964 (D. Kan. 1991) and *Fleetwood Enters. v. Coleman Co.*, 161 P.3d 765, 775 (Kan. Ct. App. 2007)).

A Kansas court may not enforce a choice of law provision, however, if it would result in the application of law that violates strong Kansas public policy (*Brenner v. Oppenheimer & Co.*, 44 P.3d 364, 375 (Kan. 2002)). No Kansas court appears to have done this in the non-compete context. However, it could arise if, for example, the time and territory restrictions were reasonable under another state’s law but unreasonable under Kansas law.

REASONABLENESS OF RESTRICTIONS

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

When the covenant is ancillary to an at-will employment relationship, Kansas courts have held that continued employment can constitute sufficient consideration to support the restrictive covenant in certain circumstances (*Puritan-Bennett Corp.*, at 592). Other examples of sufficient consideration include:

- An initial offer of employment.
- A one-time payment.

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

When determining whether a non-compete is reasonable in duration, Kansas courts focus on the particular facts and circumstances of each case. Courts have upheld time restrictions of up to two years as reasonable (see, for example, *Weber*, at 90). Courts also have found longer restrictions to be reasonable in certain circumstances. For example, the court upheld a three-year restriction in *Wichita Clinic* (185 P.3d at 858-59).

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

When determining whether a non-compete is reasonable in its geographic reach, Kansas courts focus on the particular facts and circumstances of each case. Examples of geographic restrictions that Kansas courts have upheld include a:

- Five-mile radius from the city of Hutchinson, Kansas (*Foltz*, at 137).
- Thirty-mile radius from any office or place of business of the employer at the time the employee’s employment ends (*Weber*, at 90).
- Worldwide non-compete (*Universal Engraving, Inc. v. Duarte*, 519 F. Supp. 2d 1140, 1153 (D. Kan. 2007)).



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)?

Kansas cases have upheld non-compete provisions in the independent contractor context where the restrictions were patient-specific (see, for example, *Caring Hearts Pers. Home Servs. v. Holey*, 130 P.3d 1215, 1222-23 (Kan. Ct. App. 2006)). A court also upheld a client-specific restriction in *American Fidelity Assurance Corp. v. Leonard* (81 F. Supp. 2d 1115, 1118, 1120-21 (D. Kan. 2000)).

However, the Supreme Court of Kansas considered a non-compete in the franchisor-franchisee context and, analogizing it to employment contract, refused to enforce the restriction because the agreement had no geographic restriction (*H & R Block, Inc. v. Lovelace*, 493 P.2d 205, 212-13 (Kan. 1972)).

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?

Kansas courts have found geographic restrictions that are not fixed reasonable in certain circumstances (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.

To be enforceable, a non-compete must protect a legitimate business interest, among other things (see *Question 3*). Examples of legitimate business interests sufficient to support a non-compete include:

- Trade secrets and commercially sensitive information (see, for example, *Heatron, Inc. v. Shackelford*, 898 F. Supp. 1491, 1500 (D. Kan. 1995) and *Weber*, at 84).
- Customer contacts or relationships (see, for example, *Weber*, at 84 and *E. Distrib. Co.*, at 1376).
- Goodwill and reputation (*Weber*, at 84).
- Referral sources (*Weber*, at 84).

Specialized training may constitute a protectable interest sufficient to support a non-compete when it is considered with other factors, but training is insufficient if it is both:

- Minimal.
- The only protectable interest relied on by the employer.

(*Allen, Gibbs, & Houlik, L.C. v. Ristow*, 94 P.3d 724, 728-30 (Kan. Ct. App. 2004) and see also *Weber*, at 84.)

REMEDIES

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

Employers enforcing non-competes generally seek the following relief:

- Injunctions.
- Lost profits and other actual damages.
- Liquidated damages, if the non-compete agreement provides for them.
- Attorneys' fees, if the non-compete agreement provides for them.

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

To obtain a preliminary injunction enforcing a non-compete, an employer must show:

- A substantial likelihood that the employer will prevail on the merits.
- The employer will suffer irreparable injury unless injunctive relief is granted.
- Proof that the threatened injury to the employer outweighs whatever damages the proposed injunction may cause the employee.
- The injunction, if issued, is not adverse to the public interest.

(See, for example, *Wichita Wire, Inc. v. Lenox*, 726 P.2d 287, 290 (Kan. Ct. App. 1986) and *Heatron*, at 1498.)

OTHER ISSUES

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

Other types of agreements used in Kansas to protect confidential or trade secret information include:

- Non-solicitation agreements.
- Non-disclosure agreements.
- Confidentiality clauses or agreements.

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

Kansas courts have not addressed the doctrine of inevitable disclosure.