



# Enforceability of Employee Restrictive Agreements

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# Non Competition Agreements

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- » 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).



# FORDHARRISON

- 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.



# The reasonableness of the restrictions

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- » 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.’”

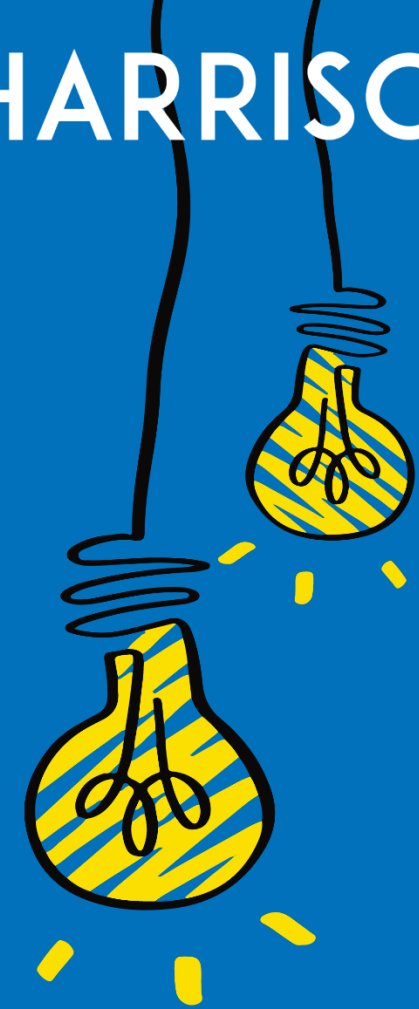
# Enforcement

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- » 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.

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.



# FORDHARRISON

- 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.





# What is a protectable business interest?

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- » **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.





# What is Specialized Training?

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- » **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.



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

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» 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.

# A “Trade Secret” is defined as:

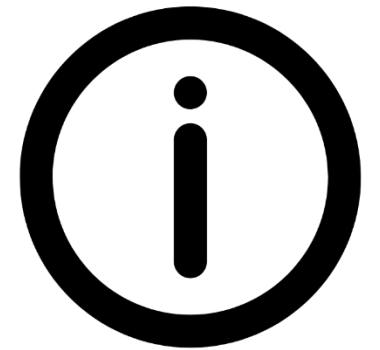
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- Information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:

- » **\*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



# Customer Relationships

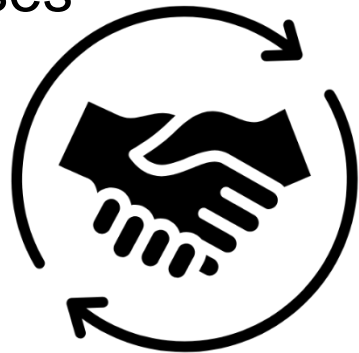
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- Customer Relationships

- » 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



# Non-Solicitation Provisions

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- » 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.”

# Consideration

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- » 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.

# Tennessee Uniform Trade Secrets Act

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- » 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



# Thank you!



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