

Non-Compete Laws: Vermont

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A Q&A guide to non-compete agreements between employers and employees for private employers in Vermont. 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).

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

Vermont has no general statute or regulations governing non-competes.

Industry- or Profession-Specific Statute or Regulation

Barbers and Cosmetologists: 26 V.S.A. § 281(c)

For barbering and cosmetology, 26 V.S.A. § 281(c) governs non-compete agreements.

Attorneys: VT R PROF COND Rule 5.6

In the legal industry, VT R PROF COND Rule 5.6 governs non-compete agreements.

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

Vermont has no general statute or regulations governing non-competes.

Industry- or Profession-Specific Statute or Regulation

Barbers and Cosmetologists: 26 V.S.A. § 281(c)

Barbering or cosmetology schools may not require a person to enter into a covenant not to compete with the school or an affiliate as a condition of training for a license (26 V.S.A. § 281(c)).

Attorneys: VT R PROF COND Rule 5.6

An attorney cannot offer or make a:

- Partnership, employment, or other similar agreement that restricts attorneys from practicing law after ending the relationship, except for an agreement about retirement benefits.



- Settlement agreement that restricts attorneys from practicing law.

(VT R PROF COND Rule 5.6.)

Common Law

Under Vermont case law, a non-compete agreement must be reasonable and justified. Vermont courts enforce non-compete agreements unless they find the agreement either:

- Contrary to public policy.
- Unnecessary for the protection of the employer.
- Unnecessarily restrictive of the rights of the employee.

The court also considers the subject matter of the contract and the circumstances and conditions under which it is to be performed. (*Roy's Orthopedic, Inc. v. Lavigne*, 454 A.2d 1242, 1244 (Vt. 1982).)

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.

Historically, Vermont courts disfavored non-compete agreements as a restraint on trade and scrutinized them for reasonableness and justification (*Roy's Orthopedic, Inc.*, 454 A.2d at 1244). However, more recently Vermont courts enforce non-compete agreements that are reasonably tailored to protect the employer's legitimate interests (*Sys. & Software, Inc. v. Barnes*, 886 A.2d 762, 764 (Vt. 2005)).

Vermont courts enforce non-compete agreements unless they find the agreement either:

- Contrary to public policy.
- Unnecessary for the protection of the employer.
- Unnecessarily restrictive of the rights of the employee.

(*Vt. Elec. Supply Co. v. Andrus*, 315 A.2d 456, 458 (Vt. 1974).)

In making that determination, courts focus on both:

- The subject matter of the contract.
- The circumstances and conditions under which it is to be performed.

(*Vt. Elec. Supply Co.*, 315 A.2d at 458.)

Vermont courts enforce agreements designed to protect proprietary information, for example, trade secrets and confidential customer information. An employer's

protectable interests also include those that are significantly broader than proprietary information, for example:

- Relationships with customers.
- Employee-specific goodwill.

(*Sys. & Software Inc.*, 886 A.2d at 764-65.)

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

The issue of which party bears the burden of proof in enforcing or challenging a non-compete agreement is not entirely settled in Vermont. The 2005 decision of *Summits 7, Inc. v. Kelly* indicates that Vermont would follow the modern approach and place the burden on the former employer, but the issue was not directly before the court in that case (886 A.2d 365, 371-72 (Vt. 2005)). Older case law says that it is the former employee's burden to show that the agreement is not reasonable (*Vt. Elec. Supply Co., Inc.*, 315 A.2d at 458 (Vt. 1974)).

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

There is no reported Vermont case or statute prohibiting an employer from enforcing a non-compete if the employer, rather than the employee, terminates the employment relationship. However, the US Court of Appeals for the Second Circuit, interpreting Vermont law, found that the circumstances surrounding the employer's termination of the employee may be a factor in determining whether the agreement is reasonable (*A.N. Deringer, Inc. v. Strough*, 103 F.3d 243, 248-49 (2d Cir. 1996)).

In addition, the issue of whether the employee's termination was voluntary or involuntary is another factor a court might consider in determining whether the period of non-competition post-employment is reasonable (see Question 9).

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?

To date, Vermont courts have refused to modify and enforce overly-broad non-compete agreements (*Roy's Orthopedic, Inc.*, 454 A.2d at 1244; *Johnston v. Wilkins*, 830 A.2d 695, 700 (Vt. 2003)). However, the US Court of Appeals for the Second Circuit predicted that the Vermont Supreme Court would allow enforcement of a defective non-compete to the extent that it is reasonable and enforceable (*A.N. Deringer, Inc.*, 103 F.3d at 247-48). While the Vermont Supreme Court has not yet “blue penciled” an overly broad agreement, it suggested that doing so would be appropriate (*Summits 7, Inc.*, 886 A.2d at 374).

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

No Vermont court has addressed whether a choice of law provision in an employee non-compete agreement should be honored. Vermont courts apply the most significant interest test of the Restatement (Second) of Conflict of Laws in both tort and contract cases (*McKinnon v. F.H. Morgan*, 750 A.2d 1026, 1028 (Vt. 2000); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 894 (Vt. 1968)).

Reasonableness of Restrictions

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

In Vermont, sufficient consideration for a non-compete agreement includes:

- Signing a non-compete agreement at the time of hire for at-will employment (*Abalene Pest Control Serv. v. Hall*, 220 A.2d 717, 718 (Vt. 1966)).
- A change in job function, for example, requiring an employee to sign a restrictive covenant to change from a managerial to a former sales position (*Vt. Elec. Supply Co.*, 315 A.2d at 458-59).
- Continued at-will employment (*Summits 7, Inc.*, 886 A.2d at 372).

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

Under Vermont law, a non-compete's duration must not be greater than necessary to protect the employer's business interests (*Dyar Sales & Mach. Co. v. Bleiler*, 175 A. 27, 30 (Vt. 1934)). Factors Vermont courts consider include:

- Whether the former employee's departure was voluntary or involuntary.
- Training received from the former employer.
- Knowledge of the former employer's confidential information.
- Whether the former employee can find other employment.

(*Vt. Elec. Supply Co.*, 315 A.2d at 458; *A.N. Deringer, Inc.*, 103 F.3d at 248-49; *Sys. & Software, Inc.*, 886 A.2d at 764-65.)

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

When determining whether a non-compete is reasonable in its geographic reach, Vermont courts focus on the type of business and the duration of the agreement. Vermont courts upheld the following geographic restrictions:

- A one-year, statewide restriction for a salesman (*Dyar Sales & Mach. Co.*, 175 A. at 28).
- A five-year restriction in the county where the employer is located for a salesman (*Vt. Elec. Supply Co.*, 315 A.2d at 458; *Abalene Pest Control Serv.*, 220 A.2d at 718).
- A five-year, 25-mile restriction for competing restaurant businesses (*Fine Foods, Inc. v. Dahlin*, 523 A.2d 1228, 1230-31 (Vt. 1987)).

In contrast, the US Court of Appeals for the Second Circuit, interpreting Vermont law, held that a restriction that covered a 100-mile radius from any of the former employer's 21 offices throughout the United States was unreasonable (*A.N. Deringer, Inc.*, 103 F.3d at 248-49).

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)?

Vermont courts have not addressed this issue.

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.

Vermont courts have not addressed this issue.

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.

Assignment

Vermont has existing, old precedent holding that non-competition agreements are generally not assignable unless assignability is specifically written into the agreement (*Smith, Bell & Hauck, Inc. v. Cullins*, 183 A.2d 528, 532-533 (Vt. 1962); *Abalene Pest Control Serv.*, 220 A.2d at 720-21).

Duty of Loyalty

Employees owe a common law duty of loyalty to their employers (*Vreeland v. Essex Lock & Mfg. Co.*, 370 A.2d 1294, 1296 (Vt. 1976)). However, the duty of loyalty will not survive the termination of employment unless there is an enforceable agreement in place (*Omega Optical, Inc. v. Chroma Tech. Corp.*, 800 A.2d 1064, 1070-71 (Vt. 2002)).

Trade Secrets

Vermont has adopted the Uniform Trade Secrets Act (UTSA). The UTSA protects employers' trade secrets from misappropriation by former employees even in the absence of a confidentiality agreement or non-compete agreement (9 V.S.A. §§ 4601 to 4609).

For more information on trade secrets law in Vermont, see [State Q&A, Trade Secret Laws: Vermont](#).

Remedies

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

In Vermont, available remedies for employers enforcing non-competes include:

- Injunctive relief.
- Damages.

In *Foti Fuels, Inc. v. Kurrle Corp.*, the Vermont Supreme Court held that restitution, which is the amount of consideration paid to the seller of a business for the non-compete agreement, can be a proper measure of damages for a breach. It should be noted that this decision involved the sale of a business, rather than an employer-employee relationship, and the purchase documents included a specific dollar figure that the purchaser was paying the seller for the seller's agreement not to compete after the sale, but the court did not specify that the principle would not apply in the employer-employee context if a specific dollar figure is assigned to the non-compete agreement. (90 A.3d 885, 897 (Vt. 2013).)

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

To obtain a preliminary injunction for purposes of enforcing a non-compete in Vermont, the employer must show both a:

- Likelihood of success on the merits.
- Irreparable harm.

(Vt. R. Civ. P. 65.)

Other Issues

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

Vermont courts recognize confidentiality, non-solicitation, and invention-assignment agreements to protect confidential or trade secret information.

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

Vermont courts have not specifically addressed the inevitable disclosure doctrine.

However, in *Davison v. Caleidoscope Commc'n Co.*, a case that later settled out of court, the Superior Court of

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Vermont denied plaintiff's summary judgment motion on the former employer's counterclaim for inevitable disclosure of trade secrets. The court stated that it would be premature to dismiss the claim and acknowledged that the Vermont Supreme Court had never addressed the doctrine of inevitable disclosure. (2004 WL 5576900 (Vt. Sup. Ct. Nov. 8, 2004).)

For general information on the inevitable disclosure doctrine, see [Practice Note, Non-Compete Agreements with Employees: Protection in the Absence of Non-Competes: Inevitable Disclosure](#).

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