IS MY COVENANT NOT TO COMPETE TOO LONG?
The Legal Standard in Michigan

Introduction

When confronted with a covenant not to compete, the first question which occurs most of the time is whether it lasts too long. The typical answer given by courts examining Michigan law is that "Michigan courts have routinely upheld non-compete agreements restricting the former employee from engaging in restricted activities for periods of **six months to three years**." *Kelly Services, Inc. v. Marzullo,* 591 F. Supp. 2d 924, 939 (ED MI 2008).

While that statement is true, more or less, there is nothing "routine" about the few three year covenants which have been upheld in Michigan cases. Let's take a look at the factors which can make the difference, starting from the shortest covenants and then landing on the endangered species of covenants claiming three years' duration.

The Length of Your Covenant

Six Months. A six month covenant not to compete is clearly an acceptable restrictive period in Michigan. To enforce a covenant of this limited duration, the employer need only show that the employee had access to confidential information and/or customer lists, and that the geographical and topical restrictions are reasonable.

One Year. One year covenants not to compete are routinely enforced in Michigan, assuming once again that the other terms of the covenant are reasonable and reasonably related to the employee's prior service. For example, in one case reviewed below, the employee security guards possessed no confidential or sensitive information about the company's customers or products. In that case, even a covenant of this modest length could not be enforced.

Two Years. Once a covenant not to compete hits the two year mark, the other interacting elements of the covenant will receive greater scrutiny. As a general rule, Courts simply do not favor restricting people from their chosen line of work for this extended period. It is up to the employer to demonstrate why such a term is required. A review of two cases yielding separate results is instructive.

> *Covenant enforced* – the former employees had intricate knowledge of the former employer's restoration system and could use confidential information about the customers to steal them away. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 549 (6th Cir. 2007)
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> *Covenant not enforced* – the world wide restriction was unreasonable, and no evidence was presented that the employer even operated globally. *Capaldi v Liftaid Transportation,* 2006 Mich App Lexis 3199.

Despite the enhanced scrutiny it is still fair to say that two year covenants fit within the "routine" enforcement standard in Michigan.

Three Years. Your author rarely runs across covenants of this length in a pure employment situation. As noted above, Michigan courts nonetheless assert that covenants of up to three years are "routinely" enforced in Michigan.

In recent years, courts have reflexively cited one case as support for their "up to three years" standard: *Bristol Window & Door v. Hoogenstyn*, 250 Mich. App. 478; 650 NW2d 670 (2002). A close examination of the decision in *Bristol Windows*, however, reveals that the Court was preoccupied with a different issue, namely, whether the Michigan law enabling covenants not to compete applied to independent contractors. This question was hotly contested because the applicable statue is expressly limited to "employees." After a lengthy exposition, the Court decided that a party could restrict the competitive efforts of an independent contractor.

Save for a brief interlude, the Court in *Bristol Windows* engaged in virtually no analysis of the enforceability of the three year term at issue in that case. All in all, this is a poor example to cite in favor of a three year term for competitive covenants, as the reasoning in the opinion lends almost no support for a three year term.

So where did this "three year term is routine" standard come from? Well, one of the first cases to recite this standard, *Lowry Computer Products, Inc. v. Head,* 984 F. Supp. 1111, 1116 (E.D. Mich. 1997) refers to an Arkansas case in support of the three year outer limit. The court in *Lowry* enforced a one year limit. With all due respect to Arkansas law, this is not an on-point example of the common practice *in Michigan.*

This is not to say that three year employee restrictive covenants are not enforced in Michigan. In *Actuator Specialties Inc v Chinavare,* Court of Appeals No. 297915 (2011), the case opinion recites some bad behavior by the employees to support a covenant of that length. The court found that the former employee had stolen trade secrets, used customer information even while the employer's injunction motion was pending, and misled customers by using a form which looked like the previous employer's form. Under these circumstances, it is hard to imagine a Court granting the employee any form of relief.

When it comes to human interaction there is a significant difference between six months and three years. For example, not seeing a friend for six months is much different than a three year absence. The same dynamic applies to an employee being forcibly removed from customers he or she used to service. By and large, Michigan courts have recognized this distinction in practice; it is unfortunate that the oft-cited rule about the length of covenants fails to properly acknowledge this distinction.

Five Years. If the purchaser of a business enterprise pays hundreds of thousands or even millions of dollars to buy a business, you better believe that the buyer is going to ask for a five year covenant not to compete from the seller of that business. This is common practice. Michigan courts have recognized this distinction. In one case, the court specifically relied upon the restricted employee's purchase of company stock and his accompanying access to sensitive company information, to uphold the contractual five year covenant. *Landscape Forms v. Quinlan,* 2012 Mich. App. LEXIS 2163, at 8-9. Five year covenants will be "routinely" enforced in company

sale or stockholder situations to protect the investment of the buyer or the company, and not merely because the restricted person was also an employee.

Five year restrictive covenants in strictly employment settings are anything but routine. One notable exception arises in the case of *Neocare Health Sys. v. Teodoro,* 2006 Mich. App. LEXIS 240. In *Neocare,* the court enforced a *five year* covenant not to compete against the nurse employee. In support of its decision, the court recited the very close relationship she had with the patients, and the lack of any geographical restrictions. She could literally open up her own business next door as long as she didn't call on her former employer's patients.

The five year term in *Neocare* is an outlier. The court states in its opinion that the hotly contested five year term was not *per se* unreasonable, noting that there was no case law supporting that claim. Of course there wasn't; the common practice in the states allowing these noncompetition covenants is to utilize a multi-factor approach like Michigan. Under this analytical framework, the courts are extremely unlikely to adopt a hard and fast "per se" rule on just one factor. The *Neocare* court was stating a truism, not a reasoned basis for rejecting the plaintiff's argument.

Summary and Conclusion

When it comes to covenants not to compete for employees, it may be fair to compare the legally permitted term of such covenants to traffic lights:

Green light – six months to 18 months
Yellow light – two to three years
Red light – More than three years

The Court in *Neocare* essentially ran this proverbial "red light" by imposing a five year term on the registered nurse. While five year covenant terms are in fact customary for stockholders or sellers of a business, they are most unusual in a pure employment situation. The overall legal case record in Michigan reflects this reality.

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