

Virginia Employers: Are Your Non-Competes Enforceable?



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Restrictive covenants continue to be among the most hotly contested employment law issues in Virginia. Non-solicitation and non-competition clauses are fundamentally important to a business like yours. Drafted well, they provide your company with significant legal protections against a key employee usurping the sales opportunities and client relationships developed while in your employ to start a competing business or to provide an unfair advantage to one of your competitors. However, Virginia courts view restrictive covenants as disfavored restraints on trade. Reach too far with your non-competition provisions, and you may find yourself with restrictions that are entirely unenforceable against a former employee who misuses your business information.

So how do you balance the need to protect your business assets against the reluctance of Virginia courts to enforce non-compete clauses unless they are reasonable? The U.S. District Court for the Eastern District of Virginia provided some welcome clarity and guidance recently in *Update, Inc. v. Lawrence Samilow*.

THE CASE OF *UPDATE, INC. v. SAMILOW*

Plaintiff Update, Inc. (“Update”), a nationwide eDiscovery and legal staffing company, sued Lawrence Samilow (“Samilow”), a former top sales executive, alleging breach of contract and seeking a preliminary injunction. Samilow was responsible for developing new sales opportunities and managing client relationships directly with Update’s New Jersey and New York customers. As supervisor of national sales, he had access to the company’s information for clients across the country.

UPDATE’S RESTRICTIVE COVENANTS

A year after promoting Samilow to its top sales spot, Update required Samilow to sign an Employee Nondisclosure and Assignment Agreement (the “Agreement”). The July 2017 Agreement contained a non-solicitation clause, which precluded Samilow:

- (1) for one year after his employment ended;
- (2) from soliciting Update customers or prospective customers with whom he had contact during his employment with Update;
- (3) located within fifty miles of any Update office or facility;
- (4) for the purpose of taking away business from Update.

The Agreement also contained a non-compete clause under which Samilow was forbidden:

- (1) for one year after his employment ended;
- (2) from directly or indirectly providing to a competitor of Update;
- (3) the types of services identified in his Update job description.

SAMILOW RESIGNS, COMPETES WITH UPDATE

Update had some significant concerns. Six months after signing the Agreement, Samilow resigned his employment with Update, formed his own company, and immediately began to contact clients he had worked with during his employment with Update to solicit eDiscovery business. Samilow's newly-formed company was headquartered in New Jersey, within fifty miles of Update's New York offices, and offered services similar to those provided by Update.

The outcome of the case hinged on whether Update could show that it was likely to succeed on the merits of its claims against Samilow, applying Virginia's three part test for determining the enforceability of restrictive covenants. The test requires an employer to show that a restriction is:

- (1) narrowly drawn to protect the employer's legitimate business interest;
- (2) not unduly burdensome on the employee's ability to earn a living; and
- (3) not against sound public policy.

In determining whether a restriction is reasonable, Virginia courts analyze its duration, geographic scope, and function.

DURATION OF ONE YEAR IS A REASONABLE RESTRICTION

As noted above, the Agreement restricted Samilow's ability to earn a living for one year after the cessation of his employment with Update. The Court had little trouble concluding that a one year restriction on Samilow was reasonable. Update had invested significant resources in its clients and had built many client relationships through Samilow's work while employed with the company. The Court noted that a one-year limitation would allow Update reasonable time to try to keep its customers, without interference from Samilow. The Court was undoubtedly influenced by the facts that Samilow was a key sales executive and had company-wide knowledge about Update's customers and sales practices.

GEOGRAPHIC SCOPE OF FIFTY MILES IS NOT UNREASONABLE

The Agreement barred Samilow from soliciting Update's customers, or competing with the company by offering comparable services, within a fifty mile radius of any Update office or facility. The Court accepted the reasonableness of the 50-mile geographic restriction on Samilow's ability to earn a living, noting that the Supreme Court of Virginia had previously approved a geographic restriction of fifty miles around a former employer's three hundred offices, in a case that involved a key sales employee who had tried to compete with his former employer in violation of the employer's restrictive covenants.

FUNCTIONAL RESTRICTIONS LIMITED TO SAME SERVICES AND FORMER CLIENTS IS REASONABLE

Virginia employers have a well-established, legitimate business interest in protecting themselves from unfair competition by former employees who have gained sensitive business information, such as lists of customers, lists of suppliers, and detailed knowledge of business costs, pricing policies, and bidding techniques. In finding the functional scope of Update's restrictive covenants reasonable, the Court relied on a number of factors, including that:

- (1) Samilow had been Update's top sales executive until he resigned;
- (2) Update's restrictions on solicitations were limited only to those Update customers with which Samilow had previously worked, and to contacts that Samilow might try to make during the year following his employment "for the purpose of diverting or taking away business from Update";
- (3) Update's restriction on competition was limited to discrete geographic areas in which Samilow's efforts would logically harm Update and applied solely to the types of activities and services identified in Samilow's Job Description and offer letter.

FAILURE TO DEFINE ALL TERMS DOES NOT MAKE A RESTRICTION UNREASONABLE

Virginia courts routinely refuse to enforce restrictive covenants that are ambiguous, when that ambiguity gives rise to one or more interpretations that would be unreasonably restrictive on an employee's right to earn a living. Samilow tried to convince the Court that the Agreement was unreasonably ambiguous because Update failed to define a number of key terms – "solicit," "customers," "office branch," and "located." The Court disagreed, finding the Agreement's restrictions reasonable when the undefined terms were given their ordinary meanings, as required under Virginia contract law.

ADDING A "BLUE PENCIL" CLAUSE DOES NOT INVALIDATE RESTRICTIONS

Finally, Samilow urged the Court to invalidate the Agreement because Update had included a "blue pencil" clause. Blue pencil clauses permit a court to adjust or modify the language of an agreement to the extent necessary to eliminate any wording that would render the agreement unenforceable. Virginia circuit courts have opined that "blue penciling" is not permitted in Virginia. Yet here the Court concluded that "the addition of a blue pencil clause did not justify striking the entire Agreement because that would frustrate the parties intentions to be bound by what the Court found was a reasonable set of restrictions."

WHAT'S THE TAKE-AWAY FOR YOU AND YOUR BUSINESS?

Preventing a former employee from competing unfairly with your business, or soliciting your customers, can be fundamentally important to the success of your business. The critical question for you will always come down to exactly what restrictions on competition and solicitation the courts will find reasonable. Reasonableness is winner-takes-all contest in Virginia. Guess wrong about the reasonableness of your employee restrictions and you could find yourself left without an agreement to enforce and no restrictions on your former employees, who will be free to solicit your customers and provide competing activities and services. Virginia law on restrictive covenants is highly fact dependent and is constantly evolving. If it has been a year or more since you have had your restrictive covenants reviewed by legal counsel, now may be the time.

The attorney at Bean, Kinney & Korman with whom you regularly work can assist in evaluating the reasonableness and sufficiency of your restrictive covenants and employment agreements.