

## You've Had to Layoff Employees Because of Coronavirus Disruption: Are Their Non-Competes Still Enforceable?

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The economic disruption brought on by the Coronavirus pandemic is causing mass layoffs throughout the country – some of which may be permanent. Some of those laid off employees will undoubtedly be bound by restrictive covenants and non-competition agreements. Many employers and employees alike will therefore be asking themselves whether that non-compete is still enforceable since the layoff was involuntary. As with most questions involving non-competition agreements, there is no uniform answer that applies nationwide. Rather, the answer is highly dependent on the state where the business and employee are located.

At first blush, it is not unreasonable to think that an involuntary layoff might render a non-competition agreement unenforceable. After all, the employment itself is often the essential “consideration” required to make a non-competition agreement enforceable. Take away the consideration (i.e. job) through no fault of the employee, and one might logically assume that the non-competition agreement would disappear as well.

Some states agree with this rationale. For instance, a number of **New York** state and federal courts have held that that non-competition agreements are unenforceable when an employee is terminated without cause. *See, e.g., SIFCO Indus. v. Advanced Plating Technologies*, 867 F. Supp. 155 (S.D.N.Y. 1995)(refusing to enforce non-competition agreements against executives after plant closure). Similarly, federal courts interpreting **Illinois** law have reached the same conclusion. *See Rao v. Rao*, 718 F.2d 219 (7<sup>th</sup> Cir. 1983)(holding that a restrictive covenant is unenforceable when an employee is terminated in bad faith and without good cause).

Other states have not adopted such a blanket rule, but rather impose a balancing test whereby the nature of termination is a factor to be considered by the courts, but is not alone dispositive of enforceability. **Pennsylvania** is one of those states.

Pennsylvania courts have never directly addressed the issue of whether a laid off employee is relieved of their non-compete obligations. However, as a general rule, Pennsylvania courts apply a balancing test and look to a myriad of factors to determine whether an employee who was involuntarily terminated from his employment is still bound by a non-competition agreement. Among the factors considered are the circumstances surrounding the termination. *See, e.g., Insulation Corp. of America v. Brobston*, 667 A.2d 729 (Pa. Super. Ct. 1995). As noted in *All-Pak, Inc. v. Johnston*, 694 A.2d 347, 352 (Pa. Super. Ct. 1997), “the reasonableness of enforcing such a restriction is determined on a case by case basis” and “the mere termination of an employee [does] not serve to bar the employer’s right to injunctive relief.” This holding was echoed by the court in *Missett v. Hub Int’l Pa., LLC*, 6 A.3d 530 (Pa. Super. Ct. 2010), which held that the mere fact an employee was terminated “to protect [the employer’s] bottom line” was not alone sufficient to render a non-compete unenforceable. Notably, the *All-Pak* court did express sympathy to the argument that a non-compete may not be enforceable where an employee is terminated “for reasons beyond the employee’s control,” *All-Pak* at 352, which could arguably be a layoff.

It should be noted that some states have addressed this very issue through legislation. For example, effective January 1, 2020, a new statute in the state of **Washington** requires employers seeking to enforce a non-compete against a laid off employee to pay the employee’s base salary for the duration of the enforcement period (often referred to as “garden leave”) *See* RCW 49.62.020(1)(c)

**Massachusetts** also has statutory “garden leave” provisions mandating the payment of at least 50% of the employee’s highest base salary during the prior two years during the restrictive period or “other mutually-agreed upon consideration.” See Mass. General Laws c.149 § 24L.

Bottom line: Do not automatically assume your employee non-competition agreements disappear merely because you have had to layoff your employees. Consult with counsel familiar with the laws in the states where you operate for a clearer picture of non-compete enforceability under that jurisdiction’s law.

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