

大成 DENTONS

Global Employment Webinar Series

Employee restrictive covenants

Webinar 1:

US, Canada and Latin America

September 29, 2022

8am PST | 11am EST | 4pm GMT | 5pm CET | 12am HKT

Grow | Protect | **Operate** | Finance

Welcome

Today's Speakers



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Agenda

- Introduction - Types of restrictive covenants
- Regional overviews
- Key trends
- Drafting tips
- How can Dentons help?
- Q&A

A group of people in a meeting, with a blue semi-transparent overlay covering the lower portion of the image. The people are seen from behind, looking towards a screen or document. The overlay is a solid blue color with rounded corners on the right side.

Introduction

Primary Types of Restrictive Covenants

Non-Competition

Agreement that prevents an employee from engaging in work that is competitive with the employer's business during employment and for a reasonable period and within a reasonable geographic area after the employment relationship ends

Non-Solicitation

Agreement that prevents an employee from soliciting, directly or indirectly, clients, customers, or suppliers of their former employer

Non-Recruitment (or Non-Poach)

Agreement that the employee will not solicit or recruit other employees away from the company during employment and after employment ends

Other Types of Restrictive Covenants

Non-Disparagement

Agreement that prevents an employee from making disparaging or derogatory statements about the employer during and/or after employment

Return of Property

Agreement that requires employee to return documents, electronic data, equipment, and other employer property at time of termination of employment.

Confidentiality

Agreement that the employee will not disclose the employer's confidential information (including but not limited to, trade secrets, proprietary information, intellectual property, etc.) during employment and after employment ends

A group of people in a meeting, with a blue semi-transparent overlay covering the lower portion of the image. The people are seen from behind, looking towards a screen or document. The overlay is a solid blue color with a slight gradient, and the text 'US Overview' is written in white, bold, sans-serif font on the left side of the overlay.

US Overview

Restrictive Covenants in the US

- Because covenants act as restraints of trade, courts are generally skeptical of enforcement.
- In most states, covenants can be enforced, but only if they are narrowly tailored and reasonable in *time*, *geographic territory*, and the *scope of prohibited activity*.
- Courts often require a justification for enforcement, such as protection of confidential information or customer goodwill.
- In a few states, employment-context non-competes are entirely (or almost entirely) unlawful (California, Oklahoma, North Dakota)

Restrictive Covenants in the US

Even where enforceable, there is significant variation in how covenants are analysed among states:

- Consideration
- Time, territory, scope of activity
- Enforceability if employer terminates employment
- Public interest
- Whether non-solicit can extend to all customers, or only those with whom the employee had contact
- Reformation of overly broad covenants
- Forfeiture-for-competition





Canadian Overview

Restrictive Covenants in Canada

Non-Compete

- General rule: non-compete agreements are a restraint on trade and contrary to public policy
- Onus on employer to establish that the agreement is necessary and reasonable in the specific circumstances
- Must include reasonable terms: temporal scope, geographical scope, definition of the business interest in need of protection

Ontario

- *Working for Workers Act, 2021* (Bill 27): prohibition on non-compete agreements in Ontario, with a few exceptions
- Ban applies to non-compete agreements entered into after October 25, 2021

Quebec

- Without cause terminations

Restrictive Covenants in Canada

Confidentiality

- Purpose to protect against the misuse of company information
- Implied term of employment
- Written confidentiality agreements are recommended
- *No requirement for temporal limitation
 - *Note that in Quebec, confidentiality obligations only continue for a reasonable period of time post cessation of employment*
- Should include a clear description of the information that cannot be disclosed

Restrictive Covenants in Canada

Non-Solicitation

- Employees/Contractors/Consultants
- Clients
- Customers

Non-Solicitation Agreements must include:

- Reasonable temporal scope
- Clarity on the individuals covered



The background of the slide features a group of people, likely dancers, wearing traditional Latin American clothing. The scene is overlaid with a semi-transparent blue filter. The text 'Latin America Overview' is prominently displayed in white, bold font across the center of the image.

Latin America Overview

Non-Compete

Valid in most jurisdictions (except Colombia)*

- **If widely drafted ⇒ Non-compete clauses may affect employees' constitutional rights (e.g., right to work)**
- **Courts accept non-compete clauses if certain conditions are met:**
 - ✓ **Time limit: usually a term ranging from 6 to 12 months**
 - ✓ **Geographic limit: usually the jurisdiction where the employee worked (Argentina, Chile)**
 - ✓ **Limited to specific activities or industries (Argentina, Brazil, Chile)**
 - ✓ **Reasonable compensation (Argentina, Brazil, Chile, Costa Rica, Uruguay, Perú, Venezuela)**

** Non-compete clauses agreed with employees to be applicable after termination of employment are considered null and void (Article 44 of Colombian Labor Code).*

Confidentiality agreements

- Time limit
- Clear description of the information that cannot be disclosed by the employee
- Potential consequences in case of violation
- Legislation protecting confidential information

A group of people in a meeting, with a blue semi-transparent overlay covering the image. The text 'Key Trends' is overlaid on the left side of the image.

Key Trends

Key Trends: The U.S.

- Some states are imposing new *procedural safeguards*:
 - ✓ Prohibitions on imposing non-competes on low-wage workers
 - ✓ Advance notice of covenants before employment begins
 - ✓ Partial or full payment of salary during non-compete period
- Discussion of federal legislation to limit or prohibit non-competes
- Antitrust enforcement regarding no-poach agreements

Key Trends: Canada

- Ontario: non-compete prohibition post October 25, 2021, will other provinces follow suit?
- Non-solicit agreements for lower level employees: 6 months
- Non-solicit and non-compete for senior levels: 12 –18 months
- Restrictive covenant agreements relating to a transaction: can be 24+ months

Key Trends: Latin America

- Case law admitting restrictive covenants if factual conditions are met
- Application to high level positions
- Minimize sophistication for lower employees
- More restrictions for lower employees for contradicting “*pro operarii*” principle

The background of the slide features a photograph of several individuals in a professional setting, likely an architectural or engineering office, gathered around a table to examine large-scale drawings or blueprints. The image is dimly lit and has a strong blue color cast. A semi-transparent blue gradient overlay covers the entire scene, with the text 'Drafting Tips' positioned on the left side.

Drafting Tips

Drafting Tips: The US

- Consider range of tools (non-solicits, confidentiality, return of documents) in addition to, or instead of, a noncompetition covenant
- Don't be greedy
- Think about choice of law and choice of forum
- Tie to incentive compensation where possible
- Tie to ownership or partnership where possible
- Consider whether a geographic “step-down” provision may be appropriate
- Decide whether to tailor to individual state and individual employee, or instead use a single template across multiple jurisdictions

Drafting Tips: Canada

4 commandments for drafting:

- The clause must be reasonable
- The clause must not go further than necessary
- The clause must protect a legitimate proprietary interest
- The clause must be clear

Note: Non-solicitation clauses must be carefully drafted so that they do not read as a quasi non-compete

Drafting Tips: Latin America

- Always in line with compliance policies and code of conduct
- Clear description of those forbidden conducts when drafting employment contracts or its addendums
- Clear description of the consequences in case of future violations either during or after employment
- Constant capacitation and training for ensuring compliance
- The omission of due control is the main cause for triggering adverse consequences

A group of people in a meeting, overlaid with a blue semi-transparent rectangle. The text "Regional Snapshots" is centered in white on the blue area.

Regional Snapshots

Regional Snapshot – Selected US States

	Non-compete	Non-solicit clients	Non-poach employees	Non-interfere suppliers*	Payment required?	Advance notice required?	Maximum length
California	✗	✗	✗	✗	N/A	N/A	
Florida	✓	✓	✓	✓	✗	✗	6 months or less is presumptively reasonable; more than two years is presumptively unreasonable
Georgia	✓	✓	✓	✓	✗	✗	2 years or less is presumptively reasonable
Illinois	✓**	✓**	✓**	✓**	✗	✓	
Massachusetts	✓**	✓	✓	✓	✓	✓	1 year after employment
New York	✓	✓	✓	✓	✗	✗	
Texas	✓	✓	✓	✓	✗	✗	
District of Columbia	✓**	✓**	✓**	✓**	✗	✓	1 year after employment

* Assuming that the covenant is drafted as a proper non-solicit

** Covenants are not permitted for certain lower-wage workers.

Regional Snapshot – Canadian Provinces

	Non-compete	Non-solicit clients	Non-deal clients*	Non-poach employees	Non-interfere suppliers**	Payment required?***	Maximum length
Alberta	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
British Columbia	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
Manitoba	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
New Brunswick	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
Newfoundland & Labrador	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
Nova Scotia	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
Ontario	No, subject to 2 exceptions	✓	No, subject to 2 exceptions	✓	✓	✗	Employee Agreement v. Transaction
Prince Edward Island	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction
Quebec	Only in certain circumstances	✓	Subject to Civil Code	✓	✓	✗	Employee Agreement v. Transaction
Saskatchewan	✓	✓	✓	✓	✓	✗	Employee Agreement v. Transaction

* This is treated the same as a non-compete

** Yes, if drafted as a proper non-solicit

*** Payment/consideration is not required if agreements are signed *before* the employee starts work. Otherwise, consideration is required.

Regional Snapshot (Latin America – Slide 1)

	Non-compete	Non-solicit clients	Non-deal clients	Non-poach employees	Non-interfere suppliers	Payment required?	Maximum length	Plus?
Argentina	✓	✓	✓	✓	✓	✓	24 months	No specific provisions – case law precedents – enforceability of non compete subject to requisites – Protection to confidential information is regulated by Law 24.766
Brazil	✓	✓	✓	✓	✓	✓	No specific term	No specific regulations - Cannot be for an indefinite term - Non compete subject to compensation and scope restrictions - Law 9279/96 protects confidential information
Chile	✓	✓	✓	✓	✓	✓	24 months	Regulated by case law precedents - while some minor judges have rejected non compete clauses the majority accept them on condition compensation and other limits are met
Colombia	✓	✓	✗	✓	✓	✗	10/20 years only for confidentiality agreements	Non compete and non solicitation of clients are forbidden (art 44 Labor Code) - only exceptionally accepted in M&A transactions

Regional Snapshot (Latin America – Slide 2)

	Non-compete	Non-solicit clients	Non-deal clients	Non-poach employees	Non-interfere suppliers	Payment required?	Maximum length	Plus?
Costa Rica	✓	✓	✓	✓	✓	✓	24 months	Regulated by case law - confidentiality is ruled by Law of Protection of Undisclosed Information
Ecuador	✓	✓	✓	✓	✓	✓	No specific term	Non compete and non solicitation disputes treated by civil courts - confidentiality regulated by Labor Code
Perú	✓	✓	✓	✓	✓	✓	No specific term	Compensation and limits are required by case law - confidentiality agreements are ruled by decree 003/97 TR
Uruguay	✓	✓	✓	✓	✓	✓	6/24 months	No specific provisions – case law precedents
Venezuela	✓	✓	✓	✓	✓	✓	6 months	Non compete ruled by the Organic Labor Law Regulations - other covenants agreed between the parties and treated by case law

How can Dentons help?

Country specific
advice

Strategic advice on
protecting your business
across all locations

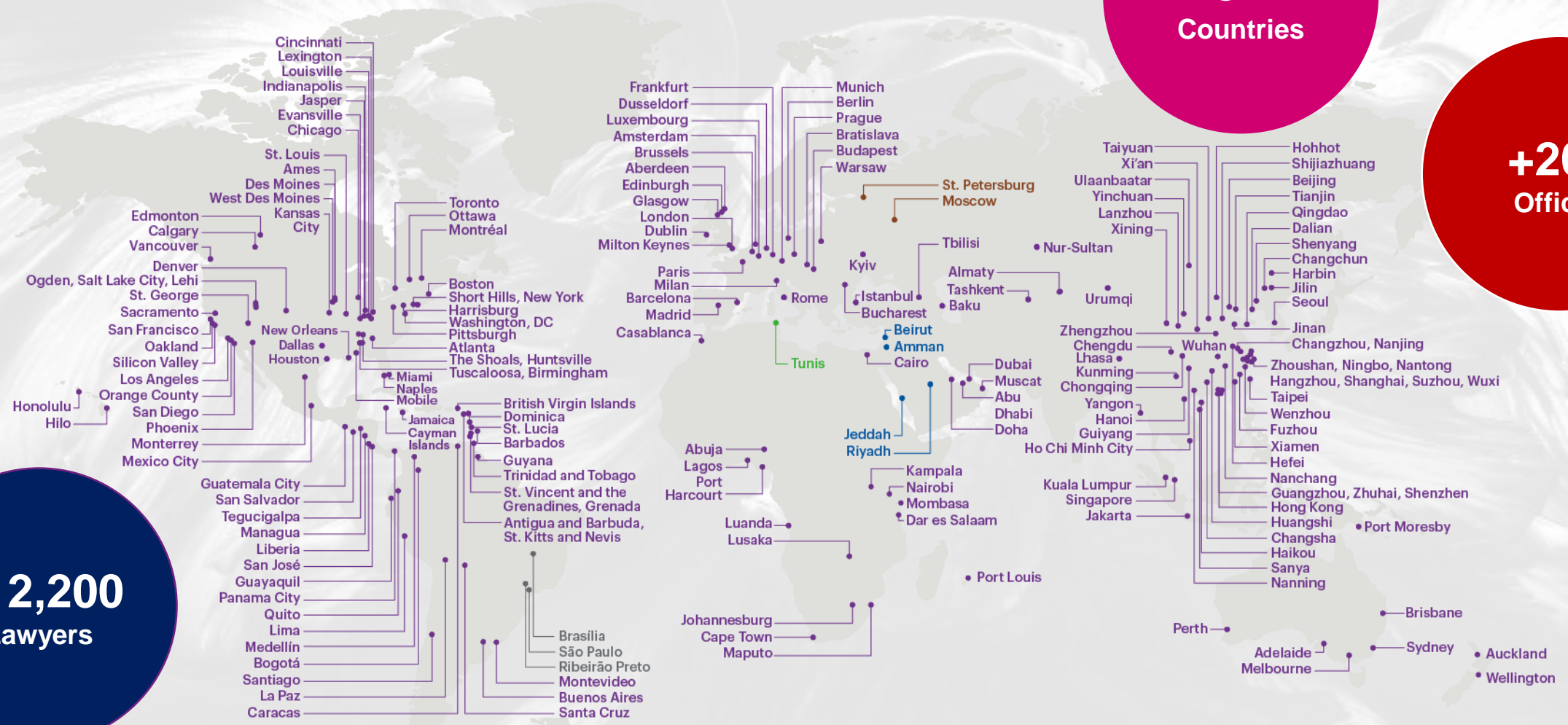
Global assessment of
covenants and uniformity
(where possible)

We are where you need us

82
Countries

+200
Offices

+12,200
Lawyers



Locations in purple represent Dentons offices.
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 Locations in green represent approved combinations that have not yet been formalized.
 Locations in gray represent Brazil Strategic Alliance.
 Locations in brown represent offices from which Dentons is separating.

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Thank you



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