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<sup>3</sup> For Owner-Occupied Commercial Real Estate loans (OOCRE), terms up to 25 years and 51% occupancy are required. Real Estate financing options are subject to approval and product availability is subject to change. For SBA loans, SBA eligibility and restrictions apply

# There Will Be No Ban on Covenants Not to Compete



By Dan Schulte, JD  
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**Q**uestion: Did the Federal Trade Commission cease litigating for its proposed ban on covenants not to compete? If we are going to continue to use them, what are some good pointers for drafting them?

**Answer:** This saga has finally come to an end. On Sept. 5, 2025, the FTC voted to accept a ruling by a federal court in Texas that it had exceeded its statutory authority when approving its proposed ban on covenants not to compete. In addition, the FTC voted to dismiss all appeals it had filed in other cases where a ruling had been made that the ban on covenants not to compete was invalid.

The FTC's Sept. 5 vote ends two-and-a-half years of speculation regarding the future enforceability of covenants not to compete. We now know that Michigan statutory and common law will primarily (federal antitrust laws rarely but sometimes also come into play) control the enforceability of covenants not to compete.

The following are some guidelines for consideration when drafting a covenant not to compete for your employees or reviewing one in an employment agreement you are considering signing.

**1. Term.** Michigan courts have consistently held that two years or less is a reasonable term for a covenant not to compete in an employment agreement. Keep in mind that covenants not to compete in a purchase agreement when a practice is being sold have been held to be valid for up to five years. The type of practice situation covered makes a difference.

**2. Restricted territory.** The number of miles should be no greater than what is necessary to protect your current population of patients from competition by an ex-employee. If all your patients live within a 10-mile radius of your office, then a 10-mile radius is likely going to be deemed a reasonable restricted area by a court. Arbitrarily insisting on something more than a 10-mile radius will likely be unenforceable.

**3. Liquidated damages.** The purpose of this provision is for the parties to establish in advance what the employer's damages will be deemed to be in the event of a breach of the covenant not to compete by the employee. A liquidated damages provision is necessary only when the damages from the employee's breach will be difficult to measure for some reason. This is usually not the case for a dental practice, where the lost profit on dental services provided to patients in violation of the covenant not to compete can easily be determined. Employers who arbitrarily insist on liquidated damages amounts that have no reasonable relationship to the employer's actual lost profits (for example, \$15,000 per patient treated by an employee in violation of a covenant not to compete) will likely be unsuccessful in obtaining enforcement by a court. Only when the employer can show the liquidated damages amount bears a reasonable relationship to the amount of the employer's actual damages resulting from a breach is there a reasonable likelihood the provision will be enforced.

**4. Enforceable vs. enforced.** Sometimes an enforceable covenant not to compete will not be enforced by a court. Courts have broad equitable power and discretion in this and other areas. The conduct of the employer and employee many times is taken into consideration by a court when deciding to enforce a covenant not to compete. An employee will be able to use the fact that the employer has breached the employment agreement (for example, not paid the employee exactly what is owed, not paid timely, failed to give notice required, made representations that were not true, etc.). Other factors may be taken into consideration by the court, such as if the restricted area includes a location that lacks an adequate number of dental practices to meet the demand for dental services. A covenant not to compete must be enforceable, having reasonable time and geographic restrictions. ●

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