

NON-COMPETE AGREEMENTS

A Good Tool to Help Protect Your Business



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Two of your company's most valuable assets are your customer relationships and your confidential information. Developing strong relationships with your customers is what drives your revenue, and protecting the confidentiality of your business information is what helps maintain your competitive advantage.

Yet despite the enormous investment in developing these critical assets, many companies fail to take the appropriate steps to ensure they are adequately protected. Losing a senior manager, sales representative or other key employee often means the loss of a significant personnel investment. That loss is compounded when the former employee uses your information to compete with you and then steals your customers.

The law provides a measure of protection to all businesses against post-employment competition, but in most instances it is not enough. Trade secret laws protect against the theft of certain highly confidential and valuable information. Many types of proprietary business information, however, do not constitute trade secrets and are not protected.

Similarly, the law protects against the theft or conversion of property, which can include business records and documents, but the remedies available to employers when an employee takes such items are rarely sufficient to ensure the information will not be used competitively against you. In general, if an employee quits or gets fired, he or she is free to stay in the industry, work for (or start) a direct competitor and actively solicit your customers.

But there is something you can do to dramatically increase the protection of these critical business assets: Require your employees to sign a carefully drafted restrictive covenant agreement, commonly referred to as a "non-compete." A common misperception is that "non-competes aren't worth the paper they're written on." It is true that the law favors free market competition and disfavors restrictions on an individual's right to earn a livelihood, so it can be difficult to enforce post-employment restrictive covenants.

These types of agreements, though, are valid in most states if they are narrowly tailored to protect the employer's legitimate business interests (such as confidential information, customer relationships and business goodwill) and they are not more restrictive than necessary to protect those interests. While an overbroad covenant may be completely unenforceable (or subject to substantial reduction by the court), a properly written covenant can provide significant protection against post-employment competition.

Restrictive covenant agreements generally include three types of restrictions:

- A confidentiality/non-disclosure provision is designed to protect an employer's confidential business information – such as customer information, financial data, strategic information and proprietary methods – from unauthorized use or disclosure by the

employee. These types of agreements extend far beyond state trade secret laws because they can more broadly define the types of proprietary information that are protected, and because they can include remedies for breach that are more beneficial than what is available by statute. These provisions also typically require the employee to return all company property and data upon termination of employment, adding a significant additional measure of contractual protection.

- A non-competition covenant (the traditional "non-compete") prevents a former employer from engaging in certain types of competitive activities in a defined geographic area over a specified period of time (usually from six months to two years). Courts tend to disfavor these types of covenants because they may effectively prevent the employee from working in the industry where he or she has earned a livelihood. Even so, if narrowly crafted and limited by activity, geography and time, courts in most jurisdictions (with California being a notable exception) will enforce these types of covenants against key management and sales personnel.
- A non-solicitation covenant prohibits a former employee from soliciting or servicing the employer's customers for a defined period of time (again, usually six months to two years). Courts tend to be more inclined to enforce these types of covenants because they recognize the significant investment that companies make in their customer relationships. Although geographic non-competes are designed to prevent a former employee from competition generally, non-solicitation covenants more narrowly protect key customer relationships. This type of covenant is critically important, especially for key management and sales personnel who interact regularly with customers. Non-solicitation covenants can also prohibit a former employee from recruiting your employees, which can be a significant deterrent when a key employee leaves and then tries to entice his or her former co-workers away.

To develop enforceable restrictive covenant agreements, employers must take into account two very important considerations. First, each covenant must be meticulously drafted to protect the specific interests of that particular business and to limit the activity restrictions based upon the individual employee (or classification of employee) for whom the covenant is designed. Generic, form non-competes are most likely not enforceable. Each agreement must be thoughtfully developed for your business.

Second, state laws vary greatly in this area. Some

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states prohibit certain types of competitive restrictions altogether, while other states actually require courts to enforce them to the extent they are reasonable. Some states have draconian rules for reducing overly broad covenants, while other states give judges substantial discretion. Some states require additional consideration for non-competes,

while in others continued at-will employment is enough. Knowing the laws of each state where you do business and tailoring your agreements for applicable laws is imperative.

In short, requiring your key employees to sign carefully drafted and narrowly tailored restrictive covenant agreements is one of the most important steps you can take to protect

your company's confidential information and customer relationships. If you haven't done that yet, or if you haven't reviewed your agreements recently to ensure they comply with current law, now would be a good time to consult with knowledgeable counsel who can assist in that process.