

Non-Compete Agreements

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Non-compete agreements (also known as restrictive covenant agreements) protect companies against losing valuable employees and from confidential information such as trade secrets ending up in the wrong hands.

Employers should not be overzealous when drafting non-compete agreements and should take many considerations in account before asking their current or potential employees to sign on the dotted line. Since non-competes are often the subject of litigation, it is advised that you consult with your legal counsel when drafting your agreement. Here are some factors to consider:

- Whether a restrictive covenant is legally enforceable in your state
- Scope of the agreement – Non-compete agreements are generally upheld more often when the geographic scope is smaller, the duration of the agreement is shorter and the type of restricted activity is minimal. Non-compete agreements usually last approximately six months to two years after the end of employment. If the agreement extends beyond that point, the court may look at the agreement under more scrutiny. It is important to have legal counsel draft your agreement since state law will often govern the scope of the agreement.
- The company must have a solid business reason for asking the employee to sign the agreement such as protecting trade secrets or a customer base that the company has worked hard to create and maintain.
- Employees must be given something in return for signing the agreement. For potential employees, this is generally a job offer.

Who Should Sign a Non-Compete Agreement?

Though not set in stone, employers should consider having the following employees sign a non-compete agreement:

- Employees engaged in research or product development
- Engineers and drafting employees involved in designing or engineering work
- Employees involved in the service of machinery, appliances, apparatuses and similar products available through the business
- Supervisory employees of manufacturing, maintenance and production departments who have authority over the manufacturing and production of products
- Employees doing creative work such as advertising, broadcasting, sales promotion and developing trade names
- Employees who encounter customer problems and interactions
- Employees involved in processing details of experimental, inventive or creative work
- Employees who have gathered a sufficient amount of information from the company to start one of their own

Employees who have knowledge of pricing (such as sales professionals), costs, profit margins, salary structures and customer lists

Tenets of a Non-Compete Agreement

A valid restrictive covenant will generally have the following details (varies by state law):

- Time period covered by the agreement, both during and post-employment
- Trade secrets, technology, methods, customers, confidential information or other protected interests
- Geographic restrictions or customer restrictions
- Reasoning for the non-compete agreement

Before asking a current or potential employee to sign a non-compete agreement, think about whether that employee is so valuable that losing him/her to a competitor would damage your business. Also consider how much that employee knows and can potentially reveal to others before enforcing such an agreement. The rule of thumb is that being extremely tough in these agreements is not always the most beneficial. In fact, most courts will not enforce unreasonable agreements. Therefore, it's best to create an agreement that protects your company while also not punishing employees for choosing to leave.

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