

WHEN TO USE A NON-COMPETE AGREEMENT

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There's a place and purpose for Non-Compete Agreements but perhaps not as widely as currently being used. In my view, a non-compete is appropriate for certain officers and management, but not for most staff and salespersons. Here's why (if you would like to see a typical Non-Compete Agreement, email me at the address below).

- 1. What is it?** Just like it sounds, the Non-Compete Agreement prohibits an employee from working in a related business, in a specific geographical area, for a period of time. The non-compete can be a separate agreement or a provision in an employment agreement.
- 2. Is it enforceable?** Generally yes (unless you're in California) if it (a) is reasonable in scope, geography and duration, (b) is supported by consideration (e.g., if the agreement is signed *after* employment begins, the employee may need to receive something of value such as compensation), and (c) safeguards a legitimate business interest of the employer such as the use of confidential information (e.g., a customer list developed by the employer).
- 3. Who should be subject to a non-compete?** In my view, [at-will employees](#) shouldn't be subject to a non-compete because in most cases they do not possess the trade secrets, confidential or proprietary information that an employer must protect. Sure there will be some sales people or staff members that have access to relationships or information acquired during employment that can harm the employer, but this is not the case for the most part. Then again, if the employer is willing to pay severance, I have less sympathy for an employee's complaints.
- 4. What an employer should know:** Courts try to balance the employee's right to work in his or her trade versus the employer's concerns of protecting its business interests from unfair competition. This is a factual analysis and will vary in every instance. Will you be able to stop an employee from working anywhere for anyone? No, because that fails the "reasonableness" test. Non-competes have the best chance of success when the scope is limited to activities that directly compete with the employer, the geographical area is limited to where the employer conducts business, and the period is no longer than the viability of the confidential information.
- 5. What an employee should know:** Non-Compete Agreements that you freely sign on the way in can harm you on your way out, so carefully consider the ramifications. Your goal is to narrow all of the elements of the non-compete as much as possible (scope, geography, time and others). You should ask that the agreement provide that the non-compete will terminate if you are laid off or discharged without cause. If you have the leverage, you should ask the employer to pay severance during the period of the non-compete.

6. **Consequences:** If an employee violates a valid Non-compete Agreement, the employer has several remedies, none of them pleasant for the employee (although they can be costly for the employer to pursue and for the employee to defend). The employer can file a lawsuit seeking a temporary restraining order and preliminary injunction to stop the employee from working at the new company as well as requesting monetary damages. Most importantly, the employee's new employer will not be pleased, especially if he is dragged into the lawsuit.

Have our readers had an experience with a non-compete. Feel free to comment or send an email to jcohen@ctswlaw.com or jcohen@homefurnishingslaw.com.

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